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79-1344

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1980

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**No. 79-1344**

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MICHAEL M., *Petitioner,*

v.

THE SUPERIOR COURT OF SONOMA COUNTY, *et al.*,
*Respondents.*

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ON WRIT OF CERTIORARI TO THE SUPREME COURT
OF CALIFORNIA

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## BRIEF OF WOMEN'S LEGAL DEFENSE FUND AS AMICUS CURIAE IN SUPPORT OF PETITIONER

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July, 1980

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## BRIEF OF WOMEN'S LEGAL DEFENSE FUND AS AMICUS CURIAE IN SUPPORT OF PETITIONER

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### STATEMENT OF INTEREST

Pursuant to Supreme Court Rule 42(2), the Women's Legal Defense Fund submits this brief as *amicus curiae* in support of the petitioner. This brief is filed with the written consent of both parties; the letters of consent have been filed with the Clerk. The interest of this *amicus* is as follows. The Women's Legal Defense Fund was founded in 1971 as a non-profit organization dedicated to the elimination of discrimination on the basis of sex. This *amicus* is committed to the eradication of gender-based discrimina-

tion against either sex, whether it appears in the area of employment or, as here, in the criminal law. *Amicus* has examined the issue presented in this case from the perspective of its commitment to equal treatment of both sexes, and it believes that the decision in this case will have a significant impact on the problem of differential treatment of sexes generally and on sex discrimination in the criminal law particularly.

## QUESTION PRESENTED

Whether California Penal Code Sec. 261.5, which permits the criminal prosecution of a minor male for engaging in consensual sexual intercourse with a minor female while the minor female is not liable for prosecution under the statute, violates the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States.

## SUMMARY OF ARGUMENT

*Amicus'* argument to this Court is simple: because California Penal Code Sec. 261.5 makes the criminality of an act of consensual sexual intercourse between minors [1] dependent solely on the sex of the male participant, even though the act is, perforce, committed by minors of both sexes, the statute creates a classification by gender that is not fairly and substantially related to important governmental objectives and is thus violative of the Equal Protection Clause of the Fourteenth Amendment.

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[1] *Amicus* recognizes that, on its face, California Penal Code Sec. 261.5 applies to acts of forcible as well as consensual intercourse, and that it also applies, on its face, to acts of intercourse between minor females and adult males. Although our argument is restricted to the factual setting of the case now before the Court, *viz.*, an act of consensual intercourse between minors, we do not mean thereby to imply that we believe the statute to be unconstitutional *only* as applied to consensual acts between minors. Rather, this *amicus* agrees with and adopts the arguments of *amicus* American Civil Liberties Union with respect to the unconstitutionality of the statute as it reaches facts other than those presented by this case.

## ARGUMENT

### The Gender-Based Distinction In California Penal Code Sec. 261.5 Is Not Fairly And Substantially Related To Important Governmental Objectives.

This case concerns the constitutionality of a statute that makes it a crime for a minor male to have consensual sexual intercourse with a minor female but does not permit the prosecution of a minor female for the same offense.

In order to meet the requirements of the Equal Protection clause, gender-based statutory distinctions must serve important governmental objectives and must be fairly and substantially related to the achievement of those objectives. *Caban* v. *Mohammed,* 441 U.S. 380 (1979); *Craig* v. *Boren,* 429 U.S. 190 (1976); *Reed* v. *Reed,* 404 U.S. 71 (1971). Thus, the question here is whether the distinction between minor males and females embodied in California Penal Code Sec. 261.5 bears any substantial relation to important governmental interests. In our view, it does not.

Three objectives are ordinarily advanced as the *raison de etre* of statutory rape laws: first, preservation of the chastity of minor females; second, protection of minor females from adverse psychic or physical consequences resulting from sexual intercourse; and third, prevention of pregnancy among minor females.[2] Upon analysis, however, it is apparent that none of those objectives are substantially advanced by gender-discriminatory statutes like California Penal Code Sec. 261.5.

The first two purported objectives—preservation of chastity and protection from the adverse consequences of sexual

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[2] *See* Di Gennaro, *Statutory Rape Law in California: Unequal Protection of the Minor Male,* 2 CRIM. JUSTICE J. 239, 242-247 (1979); Comment, *Forcible and Statutory Rape: An Exploration of the Operation and Objectives of the Consent Standard,* 62 YALE L. J. 55, 75-78 (1952).

intercourse—reflect the very questionable assumption that minor females are incapable of making intelligent and informed decisions about sexual matters. In other contexts, this Court has rejected similar arguments and has recognized the capacity of minor females to make such decisions for themselves. *Bellotti* v. *Baird*, —— U.S. —— (1979) (minor females may well have the maturity to decide to abort an unwanted pregnancy independent of their parents' wishes); *Planned Parenthood of Central Missouri* v. *Danforth*, 428 U.S. 52 (1976) (a state may not impose a blanket provision requiring the consent of a parent or a person *in loco parentis* as a condition for abortion for an unmarried female minor during the first twelve weeks of her pregnancy); *Carey* v. *Population Services International*, 431 U.S. 678 (1977) (a state may not prohibit the sale or distribution of contraceptives to minors).[3] The notion underlying California Penal Code Sec. 261.5—that because young women are incapable of making informed decisions to engage in sexual intercourse it is appropriate to shield them from the consequences of their folly, while at the same time criminal sanctions may legitimately be imposed on young men because they, by contrast, are sufficiently competent to make such decisions—is simply another remnant of what this Court has called "romantic paternalism." *Frontiero* v. *Richardson*, 411 U.S. 677, 686 (1973). And in any event, it is self-evident that a statute which authorizes criminal punishment of minor males while allowing females to engage freely in sexual activity without prosecution is not even rationally, much less fairly

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[3] The proposition that minor females can and do make intelligent decisions on sexual questions is supported by the empirical findings of social scientists. *See, e.g.*, Zelnik & Kantner, *Sexual and Contraceptive Experience of Young Unmarried Women in the United States, 1976 and 1971*, 9 FAMILY PLANNING J. 55 (1971).

[4] This was the only rationale relied upon by the Supreme Court of California in sustaining the constitutionality of California Penal Code Sec. 261.5.

and substantially, related to the goals of preserving chastity and protecting young women from harm.

Likewise, the prevention of pregnancy objective [4] is clearly not substantially served by a statute that criminally penalizes only the potential father for a consensual act of intercourse where the undesirable result—pregnancy—is patently the responsibility of the female as well as the male participant in the act. Cf. *Meloon* v. *Helgmoe*, 564 F.2d 602, 608, n. 7 (1st Cir. 1977), *cert. denied*, 436 U.S. 950.[5] Indeed, the fact that under California law only penetration and not emission is necessary to complete the crime thoroughly discredits the argument that California Penal Code Sec. 261.5 substantially serves the goal of pregnancy prevention.[6]

Because the gender-classification contained in California Penal Code Sec. 261.5 is not fairly and substantially related to important governmental objectives, the statute plainly denies equal protection of the laws to minor males.

## CONCLUSION

For the foregoing reasons, *amicus* Women's Legal Defense Fund urges this Court to reverse the decision of the Supreme Court of California.

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[5] *See also* decisions of state appellate courts rejecting the pregnancy prevention rationale with respect to statutes which penalize only the male participant in consensual acts, e.g., *Purvis* v. *State*, 377 So. 2d 674 (Fla. 1979); *Commonwealth* v. *MacKenzie*, 334 N.E. 2d 613 (Mass. 1975).

[6] California Penal Code Sec. 263.